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CASE NOTE

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Business and human rights implications of climate change litigation: *Milieudefensie et al. v Royal Dutch Shell*

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Abstract

In *Milieudefensie* et al. *v Royal Dutch Shell*, the District Court in the Hague ordered the respondent company to cut its global carbon dioxide emissions by 45 percent by 2030, as compared with 2019 levels. The landmark judgement represents the first imposition of a specific mitigation obligation on a private company over and above reduction targets set by existing 'cap-and-trade' regulations and/or other governmental mitigation policies. In interpreting Royal Dutch Shell's duty of care under Dutch tort law, the Court referred extensively to international soft law, including the United Nations Guiding Principles on Business and Human Rights. This note considers the implications of this case for corporate responsibility for environmental and human rights.

1 | INTRODUCTION

On 26 May 2021, the District Court in The Hague handed down a landmark judgement in the case *Milieudefensie* et al. *v Royal Dutch Shell*, ordering the respondent company to cut its global carbon dioxide (CO_2) emissions by 45 percent by 2030, as compared with 2019 levels.[1] The judgement marks the first time a court imposes a specific mitigation obligation on a private company over and above reduction targets set by existing 'cap-and-trade regulations'[2] and/or other governmental mitigation policies. The Court based Royal Dutch Shell's (RDS) obligation to reduce its emissions on its duty of care towards current and future Dutch residents. Dutch tort law, specifically Book 6, Section 162 of the Civil Code, creates an unwritten standard of care which the Court interpreted on the basis of 14 factors, including the consequences of RDS's CO_2 emissions, possible reduction pathways, the United Nations Guiding Principles on Business and Human Rights (UNGPs), and responsibilities of States and society.[3]

Milieudefensie v RDS contributes to a body of jurisprudence that builds on the *Urgenda* rulings,[4] and related cases from other jurisdictions.[5] As discussed in relation to *Urgenda*, there are features of this case that are specific to the Dutch legal system—such as the construction of the tort-based duty of care and the type of class actions that can be brought.[6] There are however also clear implications for climate change litigation around the world, not least due to the prominent role played by international human rights law, such as the European Convention on Human Rights (ECHR), in the interpretation of the standard of RDS's duty of care.[7] Moreover, the judgement shows how domestic litigation can contribute to 'hardening' international soft law in relation to standards of corporate conduct.

[1]District Court of The Hague, *Milieudefensie et al. v Royal Dutch Shell PLC* (26 May 2021) C/09/571932/HA ZA 19-379, English Version (*Milieudefensie v RDS*) para 5.3.
[2]ibid para 4.4.46.
[3]ibid paras 4.4.2ff, as discussed in detail below.

[4]*Urgenda Foundation (on behalf of 886 individuals) v The State of the Netherlands (Ministry of Infrastructure and the Environment)* (2015) ILDC 2456 (NL 2015) (*Urgenda—District Court*); *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Urgenda Foundation* (2018) C/09/456689/ HA ZA 13-1396; *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* (2019) 19/00135.
[5]United Nations Environment Programme (UNEP), *Global Climate Litigation Report: 2020 Status Review* (UNEP 2020).
[6]See J van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?' (2015) 4 Transnational Environmental Law 339. See in this case on standing: *Milieudefensie v RDS* (n 1) paras 4.2.1–4.2.7.
[7]*Milieudefensie v RDS* (n 1) paras 4.4.9–4.4.10.

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Nation States continue to be the only full subjects of international law, to the exclusion of *inter alia* corporations, which are not considered to bear direct obligations under international human rights law. Correspondingly, all existing international human rights treaties are stipulated by States for States, and corporations cannot be defendants before any international human rights body or court. At the same time, the actions of transnational corporations have significant societal and environmental impacts. Moreover, these corporations enjoy extensive rights under international investment law. This combination of great power without great responsibility has been the focus of an ongoing international debate about the need to improve corporate accountability at the international level.

Several regional and international initiatives have sought to bridge the resulting governance gaps with respect to the transnational activities of complex business conglomerates and corporate networks. However, attempts to impose direct international human rights obligations on corporations, including those carried out under the aegis of the United Nations (UN), proved to be politically controversial and ultimately failed.[8] Even the treaty on business and human rights currently under negotiation at the UN is taking shape as a traditional international instrument, which will be binding on States, not on private actors.[9]

This case reflects a general trend of increased scrutiny of environmental impacts of the activities of multinationals and other corporations.[10] This judgement hardens RDS's corporate policies on environmental due diligence and the responsibilities set out in the UNGPs, neither of which are formally legally binding. This development is of crucial importance for two main reasons: first, the impossibility of effective climate change policy without significant private action, especially by actors such as RDS which can dwarf the CO_2 emissions, and budgets, of sovereign States; and second, the slow, and arguably ineffective,[11] nature of international action around climate change mitigation. The Paris Agreement does not include legally binding emission reduction targets for its parties.[12] Yet, the agreement itself recognizes that achieving the temperature goals requires action by the private sector.[13]

This case note will briefly summarize the decision of the District Court, followed by an analysis of the impact of this case on the developing responsibilities of corporations with respect to climate change mitigation, and their role in the increasingly polycentric landscape of climate change law and policy.

2 | CASE SUMMARY

In 2019, *Milieudefensie*, on behalf of itself, six other nongovernmental organizations and over 17,000 Dutch citizens, filed a class action against Royal Dutch Shell, which is the parent company of a global network of subsidiaries involved in the production and distribution of oil and gas. The plaintiffs argued that RDS has an obligation based on the unwritten standard of care pursuant to Book 6 Section 162 of the Dutch Civil Code to contribute to the prevention of dangerous climate change.[14] In light of this obligation, the plaintiffs asked the Court to order RDS to reduce its CO_2 emissions by 45 percent by 2030, as compared with 2019,[15] including emissions based on its own business operations but also those created through sales of its energy products.[16] The claim targeted RDS in particular as the parent company of the Shell group and the entity that establishes the general policy of the whole group. RDS's corporate policy was defined by the plaintiffs as 'hazardous and disastrous' and 'in no way … consistent with the global climate target to prevent a dangerous climate change for the protection of mankind, the human environment and nature'.[17]

Procedurally, the respondent challenged the standing of the plaintiffs and the applicability of Dutch law. The Court partially allowed these objections, finding that ActionAid (one of the plaintiffs) did not have standing as its focus on protecting the interests of citizens outside of the Netherlands that was too diverse to be included in the same class action.[18] Similarly, the representation of the interest of current and future generations was limited to current and future generations of *Dutch residents* and of the inhabitants of the (Dutch) Wadden Sea area, on the basis that their interests were sufficiently aligned.[19] The Court found that 'the interests of current and future generations of the world's population' were too diverse to be bundled in the claim.[20] Without spelling out its reasoning in detail, the Court asserted that, while Dutch residents will be affected differently by climate change (in terms of timing, extent and intensity of the impacts), 'these differences are much smaller and of a different nature than the mutual differences when it concerns the entire global population'.[21] The Court also refused standing to the individual plaintiffs on the basis that their interests overlapped as the common interest of the class action, and there was no interest in addition to this common claim.[22]

With respect to the choice of law, the main point of contestation was the interpretation of the 'event giving rise to the damage' in the

[8]UN Economic and Social Council 'UN Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises' UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (26 August 2003).

[9]Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, 'Second Revised Draft: Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (2020) https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf.

[10]G Ganguly, J Setzer and V Heyvaert, 'If at First You Do not Succeed: Suing Corporations for Climate Change' (2018) 38 Oxford Journal of Legal Studies 841.

[11]L Maizland, 'Global Climate Agreements: Successes and Failures' (Council on Foreign Relations, 29 April 2021) https://www.cfr.org/backgrounder/paris-global-climate-change-agreements.

[12]R Falkner, 'The Paris Agreement and the New Logic of International Climate Politics' (2016) 92 International Affairs 1107.

[13]UNFCCC 'Decision 1/CP.21, Adoption of the Paris Agreement' UN Doc CCC/CP/2015/10/Add.1 (29 January 2016) paras 117, 133 and 134.

[14]*Milieudefensie v RDS* (n 1) para 3.2.

[15]Or in the alternative 35 percent/25 percent; ibid.

[16]ibid para 3.1.

[17]ibid.

[18]ibid para 4.2.3.

[19]ibid para 4.2.4.

[20]ibid para 4.2.3.

[21]ibid para 4.2.4.

[22]ibid para 4.2.7.

sense of Article 7 of the Rome II Regulation.[23] The Court found that RDS's corporate policy adopted in the Netherlands constitutes the event giving rise to harm, leading to the applicability of Dutch tort law to the claim.[24] However, it also acknowledged that due to the nature of the 'responsibility for environmental damage', there may be situations where multiple events give rise to damage in multiple countries.[25] This means that more than one law could be applicable, which has potential implications for other cases against corporations operating internationally.

Substantively, the plaintiffs' case builds on some of the arguments in the *Urgenda* case. As in *Urgenda*, the plaintiffs' argument rests on the interpretation of the unwritten standard of care enshrined in Book 6, Section 162 of the Dutch Civil Code, based on the 'so-called Kelderluik criteria, human rights, specifically the right to life and the right to respect for private and family life, as well as soft law endorsed by RDS, such as the UN Guiding Principles on Business and Human Rights, the UN Global Compact and the OECD Guidelines for Multinational Enterprises'.[26]

The District Court considers these factors in its assessment of RDS's standard of care as well as several additional factors, leading to a composite interpretation of the unwritten standard of care.[27] The 14 factors considered by the Court may be grouped into five distinct 'blocs': the first bloc broadly concerns the position and influence of RDS within the Shell group,[28] specifically its policy-setting role within the group, and its ability to control or influence the CO_2 emissions of the Shell group and its business relations.[29] A second bloc of factors relates to the actual emissions of the group and their consequences for the Netherlands and the Wadden region.[30] The Court notes that the group's global CO_2 emissions exceed those of many States and 'contribute to global warming and climate change in the Netherlands and the Wadden region', entailing health and increased mortality risks.[31] While recognizing that 'there is some uncertainty about the precise manner in which dangerous climate change will manifest in the Netherlands and Wadden region',[32] the Court stresses that such uncertainty does not invalidate 'the prediction that climate change due to CO_2 emissions will lead to serious and irreversible consequences' for the plaintiffs.[33]

A third bloc of interpretative factors concerns what the Court identifies as the relevant regulatory frameworks. This includes human rights standards, such as Articles 2 and 8 ECHR and soft law business and human instruments,[34] as well as emission trading systems (ETSs), such as the European Union (EU) ETS, and other 'permits and current obligations' that apply to the Shell group.[35] With respect to the EU ETS, the Court finds that its provisions 'only affects a part of the CO_2 emissions for which RDS is responsible' and only applies in the EU, therefore not addressing the global Scope 3 emissions[36] that constitute a major portion of the group's emissions and affect the plaintiffs.[37] Moreover, the Court's interpretation of RDS's reduction obligation is more extensive than the reduction target of the EU ETS, which prevents RDS from invoking the indemnifying effect of the EU ETS.[38]

The fourth bloc of factors presents the climate science on which the Court relies for its calculation of RDS's emissions reduction obligation.[39] The Court finds that the Paris Agreement goals are based on 'the best available scientific findings in climate science, which is supported by widespread international consensus'.[40] It also notes the particular risk profile of the Netherlands, where the temperature rise 'has developed about twice as fast as the global average, with serious and irreversible consequences and risks for the human rights' of the plaintiffs.[41] Building on reports by the Intergovernmental Panel on Climate Change (IPCC), the Court adopts the conclusion that reduction pathways aiming for a net 45 percent reduction by 2030 relative to 2010 'offer the best possible chance worldwide to prevent the most serious consequences of dangerous climate change'.[42] As critically remarked by Mayer, however, the Court does not explicate its motivation for several crucial choices, such as the choice for this particular reduction pattern among the options considered by IPCC and its assumption that the global 45 percent mitigation target translates into a 45 percent reduction target for the corporate group.[43]

The final bloc of factors addresses the effectiveness and fairness of imposing a reduction obligation on RDS, which is in large part a response to arguments raised by RDS.[44] First, the Court rejects the suggestion that such an obligation would run counter to the Sustainable Development Goals (SDGs). Rather, the Court finds that the 'twin challenge' of tackling climate change while meeting the global energy demand of the rapidly growing world population[45] is already factored in both the SDGs and the Paris Agreement, which are conceived as complementary, not mutually exclusive, global commitments.[46] The Court also rejects as unfounded RDS's 'perfect substitution' argument, which claims that the reduction obligation would be ineffective as competitors would simply take RDS's place.[47] Even if this argument were valid, the Court stresses, it would not erase RDS's responsibility

[23] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.
[24] ibid paras 4.3.
[25] ibid para 4.3.6.
[26] ibid para 3.2.
[27] ibid para 4.4.2.
[28] See also Section 3.3.
[29] *Milieudefensie v RDS* (n 1) para 4.4.2, factors (1), (6).
[30] ibid factors (2), (3).
[31] ibid paras 4.4.5–4.4.6.
[32] ibid para 4.4.7.
[33] ibid. On the notions of uncertainty and risk in the context of climate change's human rights impacts, see also: C Macchi and N Bernaz, 'Business, Human Rights and Climate Due Diligence: Understanding the Responsibility of Banks' (2021) 13 Sustainability 8391, 9.
[34] *Milieudefensie v RDS* (n 1) para 4.4.2, factors (4), (5). See Section 3.2.
[35] ibid factor (10).
[36] See Section 3.2 for a definition of the three categories of emissions.
[37] *Milieudefensie v RDS* (n 1) para 4.4.46.
[38] ibid.
[39] ibid factors (7), (8).
[40] ibid para 4.4.27.
[41] ibid.
[42] ibid para 4.4.29.
[43] B Mayer, 'Milieudefensie v Shell: Do Oil Corporations Hold a Duty to Mitigate Climate Change?' (EJIL:Talk!, 3 June 2021).
[44] *Milieudefensie v RDS* (n 1) para 4.4.2, factors (9), (11)–(14).
[45] ibid para 4.4.40.
[46] ibid para 4.4.42.
[47] ibid para 4.4.50.

to do its part.[48] Similarly, the fact that other State and non-State actors have a responsibility for the energy transition does not absolve RDS of its own responsibility.[49] Finally, the Court posits that 'the interest served with the reduction obligation outweighs the Shell group's commercial interests, which for their part are served with an uncurtailed preservation or even growth of these activities'.[50] In light of these considerations, the Court finds the obligation proportionate to the importance of the values to be protected—namely, the human rights of the plaintiffs—especially as RDS has complete discretion as to how to discharge its duty.[51]

Based on this interpretation of the unwritten standard of care, the Court ordered RDS 'to limit or cause to be limited' the aggregate annual volume of all CO_2 emissions of the Shell group 'to such an extent that this volume will have reduced by at least net 45 percent at end 2030, relative to 2019 levels'.[52] Importantly, this decision 'does not imply that the Shell group's CO_2 emissions are currently unlawful',[53] but it is rather based on 'an imminent violation of RDS' reduction obligation' due to the incompatibility of the group's policy with the identified obligation.[54]

3 | ANALYSIS

At present, the international human rights responsibilities of corporations are limited to soft law instruments, specifically the UNGPs and the closely aligned OECD guidelines for Multinational Enterprises.[55] Soft law can be a powerful instrument in situations of geopolitical tension and doctrinal disagreement, facilitating the development of norms that might eventually consolidate into hard law 'if, over time, its principles become widely accepted and it is evident States are treating them as legal obligations'.[56] By adopting a cautious approach to corporate responsibility to respect human rights, the UNGPs managed to attract broad international consensus. Specifically, the UNGPs reflect agreement on the need for corporations to respect human rights wherever they operate and exercise 'human rights due diligence' to identify and address the negative impacts they might be causing, contributing to or be linked to by their business relationships.[57]

There is growing evidence that the UNGPs are influencing legislation at the domestic and EU level, such as the adoption of modern slavery acts, as well as laws on mandatory human rights and environmental due diligence.[58] A comprehensive review of the use of the UNGPs and human rights soft law instruments by judicial bodies shows that, while limited, their use in litigation against corporations and public bodies is becoming increasingly common.[59] *Milieudefensie v RDS* is an important example of how these non-binding instruments can be hardened through the interpretation of domestic hard law and how they relate to environmentally damaging activities. The remainder of this section will analyse three specific aspects: (i) the role of international soft law in the interpretation of RDS' duty of care, (ii) the expansion of corporate human rights responsibilities to environmental responsibilities and (iii) the implications of this judgement for responsibilities of a parent company within a corporate group.

3.1 | International soft law instruments as interpretive tools

The Dutch Civil Code offers a specific opening to the interpretation of domestic law in the light of international instruments through the 'unwritten standard of care' enshrined in book 6 sect. 162.[60] This clause has been read by the Dutch courts as allowing for the indirect application of international law, meaning an interpretation of domestic law consistent with international norms (following the 'indirect effect' doctrine).[61] In the context of climate change litigation, the District Court in the *Urgenda* judgement confirmed that this norm could be relied upon to interpret the Dutch State's duty of care in the light of Articles 2 and 8 ECHR.[62] This finding was not decisive in *Urgenda*, as the Court of Appeal and the Supreme Court later declared the plaintiffs could directly invoke the ECHR's norms against the Dutch State. However, in the context of litigation against corporations, which are not directly bound by international treaties, the use of international human rights treaties to interpret a domestic standard of care can be key to establishing liability for what is essentially a human rights violation.

In the *Milieudefensie v RDS* judgement, Articles 2 and 8 ECHR and the UNGPs are among the 14 grounds upon which the Court based its interpretation of RDS's duty of care under the Dutch Civil Code.[63] In its assessment, the Court primarily references the UNGPs as 'an authoritative and internationally endorsed "soft law" instrument,

[48]ibid para 4.4.49.
[49]ibid paras 4.4.51–4.4.52.
[50]ibid paras 4.4.53–4.4.54.
[51]ibid.
[52]ibid para 5.3.
[53]ibid para 4.5.8.
[54]ibid para 4.5.3.
[55]Organisation for Economic Co-operation and Development (OECD), 'Guidelines on Multinational Enterprises' (OECD 2011); Office of the High Commissioner on Human Rights 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Doc A/HRC/17/31 (21 March 2011) (UNGPs).
[56]K Guruparan and J Zerk, 'Influence of Soft Law Grows in International Governance' (Chatham House, 17 June 2021) <https://www.chathamhouse.org/2021/06/influence-soft-law-grows-international-governance>.
[57]UNGPs (n 55) Guiding Principles 11–13.
[58]Examples include the modern slavery acts of Australia and the United Kingdom, the 'duty of vigilance' law in France, as well as the EU Conflict Minerals Regulation and the Commission's plan to table a draft Directive on mandatory human rights and environmental due diligence; see Debevoise and Plimpton, 'UN Guiding Principles on Business and Human Rights at 10—The Impact of the UNGPs on Courts and Judicial Mechanisms' (2021) <https://www.debevoise.com/insights/publications/2021/07/un-guiding-principles> para 34.
[59]ibid paras 35–36, 42.
[60]Dutch Civil Code, Section 6:162(2) ('a rule of unwritten law pertaining to proper social conduct') <http://www.dutchcivillaw.com/legislation/dcctitle6633.htm#:~:text=%2D%202.,no%20justification%20for%20this%20behaviour>; *Milieudefensie v RDS* (n 1) para 4.1.3.
[61]NM Jägers and MJ van der Heijden, 'Corporate Human Rights Violations: The Feasibility of Civil Recourse in The Netherlands' (2008) 33 Brooklyn Journal of International Law 833, 855, 857.
[62]*Urgenda*—District Court (n 4) para 4.46.
[63]*Milieudefensie v RDS* (n 1) para 4.4.2. See also *Milieudefensie et al. v Royal Dutch Shell PLC* (5 April 2019) File no. 90046903, Summons http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-casedocuments/2019/20190405_8918_summons.pdf paras 723–724.

which set out the responsibilities of States and businesses in relation to human rights'.[64] Although the Court notes RDS's publicly declared support of the UNGPs,[65] it also points out that, due to their universally endorsed content, 'it is irrelevant whether or not RDS has committed itself to the UNGPs'.[66] In doing so, the Court shows that it considers the UNGPs to be the global standard of expected conduct for corporations, establishing the corporate responsibility to respect human rights 'over and above compliance with national laws and regulations'.[67] It stresses that within the EU their uniquely authoritative character is reinforced by the European Commission's expectation that Member States and businesses will adhere to it.[68] The Court also affirms that the UNGPs are in line with the content of other soft law instruments, quoting the UN Global Compact and the OECD Guidelines for Multinational Enterprises.[69] While the latter replicates *verbatim* the language of the UNGPs and has a similar standard-setting character, the UN Global Compact is conceived as a voluntary 'learning platform' with no normative aspirations.[70]

3.2 | Human rights and environmental rights

While several jurisdictions have adopted or are in the process of adopting regulatory instruments that translate into binding obligations the principle of human rights due diligence,[71] it remains unclear to what extent these instruments cover the climate due diligence responsibilities of corporations.[72] The Commission's draft Directive on mandatory human rights and environmental due diligence is expected to include a broad notion of due diligence, which encompasses a climate change dimension,[73] but the concrete implications of such standard for companies remain unclear.

The current judgement provides guidance as to the climate due diligence responsibility of the Shell group, distinguishing between its direct emissions and its indirect emissions, which constitute a remarkable 85 percent of the total.[74] Importantly, the 45 percent cut mandated by the Court concerns the aggregate Scope 1 to 3 CO_2 emissions of the group.[75] Given that this result is to be achieved by 2030, the Court 'gives RDS leeway to develop its particular reduction pathway and to differentiate as it sees fit'.[76] It then provides some guidance on how RDS should approach the three different categories of emissions.

According to the World Resources Institute's Greenhouse Gas Protocol, Scope 1 emissions are 'direct emissions from sources that are owned or controlled in full or in part by the organization'; Scope 2 emissions are 'indirect emissions from third-party sources from which the organization has purchased or acquired electricity, steam, or heating for its operations', and Scope 3 emissions encompass 'all other indirect emissions resulting from activities of the organization, but occurring from greenhouse gas sources owned or controlled by third parties', which includes emissions released by the end-users.[77] On the one hand, the Court affirms RDS's 'obligation of result' to cut the group's Scope 1 emissions. On the other hand, it outlines RDS's 'best efforts' (or due diligence) obligation to reduce both its Scope 2 emissions—excluding the part of Scope 2 emissions that can be ascribed to the Shell group companies[78]—and its Scope 3 emissions, namely, the emissions produced by the group's business relationships and end-users.[79]

This distinction, that the Court does not elaborate on in detail, resonates with the 'strict' responsibility of corporations under the UNGPs to 'avoid causing or contributing to' human rights harm versus their 'due diligence' responsibility to 'seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships'.[80] The due diligence responsibility to try and influence the conduct of third parties (e.g., suppliers) is conveyed under the UNGPs through the concept of 'leverage', which can be exercised by the parent company by the means of contractual clauses in supply contracts, trainings, shareholder activism, etc.[81] In the current case, the Court notes that RDS is able to influence its end-users' emissions through the energy package produced and sold by the Shell group, 'which will require an adjustment'.[82] The Court also notes that 'RDS is free to decide not to make new investments in explorations and fossil fuels'.[83] While the Court does not go as far as requesting RDS to adopt this course of action, refraining from new investments in fossil fuels seems to be necessary to meet the mandated reduction target.[84]

As pointed out by Hösli, the Court might have overstated the international consensus concerning the existence of a legal obligation for companies to reduce their Scope 3 emissions, and there is

[64]*Milieudefensie v RDS* (n 1) para 4.4.11.
[65]The plaintiffs argued that RDS's endorsement of these soft law instruments should inform the interpretation of its duty of care; ibid para 3.2.
[66]*Milieudefensie v RDS* (n 1) para 4.4.11.
[67]ibid para 4.4.13.
[68]ibid para 4.4.11.
[69]ibid.
[70]R Mares, 'The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments' (2010) 79 Nordic Journal of International Law 193, 204
[71]See the full overview: European Coalition for Corporate Justice, 'Map: Corporate Accountability Legislative Progress in Europe' <https://corporatejustice.org/publications/map-corporate-accountability-legislative-progress-in-europe/>. See also European Parliament, 'Resolution of 10 March 2021 with Recommendations to the Commission on Corporate due Diligence and Corporate Accountability', 2020/2129[INL]) <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html>.
[72]C Mackie, 'Due Diligence in Global Value Chains: Conceptualizing "Adverse Environmental Impact"' (2021 fc) 30 Review of European, Comparative and International Environmental Law.
[73]European Parliament (n 71); B Fox, 'New Human Rights Laws in 2021, Promises EU Justice Chief' (EurActiv, 30 April 2020).
[74]*Milieudefensie v RDS* (n 1) para 4.4.19.
[75]ibid para 4.4.39.
[76]ibid.
[77]ibid para 2.5.4.
[78]These are considered by the Court as part of the Scope 1 emissions of the group as a whole; ibid para 4.4.23.
[79]ibid paras 4.4.23–4.4.24.
[80]UNGPs (n 55) Guiding Principle 13.
[81]ibid Guiding Principle 19, Commentary.
[82]*Milieudefensie v RDS* (n 1) para 4.4.53.
[83]ibid para 4.4.25.
[84]Macchi and Bernaz argue that new investments in fossil fuels by the so-called 'carbon majors' are *prima facie* incompatible with the UNGPs and the climate due diligence responsibility of corporations; Macchi and Bernaz (n 33) 11. For a similar argument in relation to the responsibility of States and of Export Credit Agencies, see also: K Cook and JE Viñuales, 'Legal Opinion—International Obligations Governing the Activities of Export Credit Agencies in Connection with the Continued Financing of Fossil Fuel-Related Projects and Activities' (2021) paras 8, 9(d), 11(b), 48–49, 57, 103, 122, 146, 150, 163 and 265(b)(e).

evidence that most companies in Europe do not assess or report on this category of emissions.[85] Moreover, the Court did not reference a relevant statement of the Dutch OECD National Contact Point in a case involving ING Bank, which largely revolved around the responsibility of the bank to develop an appropriate methodology for the assessment and reporting of Scope 3 emissions, even in the absence of uniform international standards and guidance.[86] However, the *Shell* judgement provides a first, authoritative attempt to clarify the climate due diligence responsibilities of a 'carbon major' through a holistic interpretation that builds on the UNGPs, the Paris Agreement and climate science.[87] The implications of this interpretation effort potentially go beyond the case at hand and beyond the territory of the Netherlands.

The District Court of The Hague observes that the '"global" reduction obligation, which affects the policy of the entire Shell group, gives RDS much more freedom of action than a reduction obligation limited to a particular territory or a business unit or units'.[88] At the same time, it arguably has more far-reaching implications, in that it means that the outcome of a lawsuit promoted under Dutch law to safeguard the interests of Dutch residents might spur the group's policy changes with the potential to generate effects way beyond the *forum* State's jurisdiction.

3.3 | Responsibilities of parent companies

The judgement speaks to the role and responsibilities of the parent company within a corporate group. The Court considered RDS's responsibility in determining the general policy of the Shell group, affirming that the policy-setting influence it exercises over the groups' companies implies that 'it bears the same responsibility for these business relations as for its own activities'.[89] Without formally lifting the corporate veil, the Court places the obligation on RDS as the parent company to ensure that the group policy is concrete and targeted enough to realize the reduction obligation that rests on the Shell group.[90] The fact that the group companies retain responsibility for the implementation and execution of such policy does not detract from the parent company's own responsibility.[91] The Court is *de facto* affirming that the elaboration and public communication of a group-wide climate change policy or strategy is enough to place on the parent company a duty of care to ensure that the Scope 1 emissions of the group will be reduced in line with the identified obligation of result.

This broad reading of the parent company's duty of care might impact future litigation that tries to establish parent company liability for environmental and human rights impacts caused by foreign subsidiaries. It also resonates with the recent *Vedanta* judgement, in which the United Kingdom (UK) Supreme Court found that a parent company's duty of care might arise from inadequate group-wide policy guidance giving rise to harm, adequate policy guidance implemented or supervised poorly, or failure to abide by its publicly stated role of supervision and control of its subsidiaries.[92] Interestingly, the UK Supreme Court confirmed this interpretation in a 2021 judgement against Shell, in which it rejected the restrictive approach adopted by previous judgements that narrowed down parent liability to the instance of 'operational control' exercised over the activities of subsidiaries.[93] The UK Supreme Court found that RDS's duty of care might also arise from the group-wide policy frameworks it set in place and by its public commitments.[94] The *Milieudefensie v RDS* judgement seems to confirm a global trend of judicial decisions and emerging due diligence legislations that makes it increasingly difficult for parent companies to hide behind the *fictio iuris* of the corporate veil and requires them to take responsibility for the social and environmental impacts of their subsidiaries' activities.

4 | CONCLUSIONS

Humanity's continued inability to internalize the scale and gravity of increasingly imminent climate change effects poses a profound challenge to the adoption of effective public mitigation policies.[95] In lieu of effective governmental policies,[96] courts have become an increasingly popular avenue for imposing more stringent climate mitigation obligations on public and private actors. The ambition of imposing these responsibilities on private actors is not a new one and dates back to cases such as *Kivalina v Exxon*.[97] An open question is what the effect of these cases has been on the international climate change negotiations under the UN Framework Convention on Climate Change, which noticeably emphasizes the need for 'non-party stakeholders' to act within the Paris Agreement.[98]

Milieudefensie v RDS, similar to *Urgenda*, can be considered a vehicle for speeding up and enforcing the obligations negotiated within the UNFCCC process. At the same time, as was especially clear in *Urgenda*, these judgements can have a complicated relationship with national and regional climate policies, which reflect hard-won agreements on politically sensitive targets.[99] Similarly, these cases can

[85]A Hösli, 'Milieudefensie et al. v. Shell: A Tipping Point in Climate Change Litigation against Corporations?' (2021) 11 Climate Law 195, 201–202.

[86]ibid; Dutch NCP, 'Final Statement—Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) versus ING' (2019) <https://www.oecdguidelines.nl/documents/publication/2019/04/19/ncp-final-statement-4-ngos-vs-ing> 2.

[87]C Macchi, 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate Due Diligence"' (2021) 6 Business and Human Rights Journal 93, 108–110.

[88]*Milieudefensie v RDS* (n 1) para 4.4.54.

[89]ibid para 4.4.23

[90]ibid para 4.4.52.

[91]ibid para 4.4.4.

[92]*Dominic Liswaniso Lungowe and Ors v. Vedanta Resources PLC and Konkola Copper Mines PLC* (2016) EWHC 975 (TCC) paras 52–53.

[93]*Okpabi and others (Appellants) v Royal Dutch Shell PLC and another* (Respondents) (2021) UKSC 3, paras 146ff.

[94]ibid para 143.

[95]See in detail A Rowell and K Bilz, *The Psychology of Environmental Law* (NYU Press 2021).

[96]This is true even for the EU Green Deal which advocates a 'green growth' model, rather than a degrowth model, see M Ossewaarde and R Ossewaarde-Lowtoo, 'The EU's Green Deal: A Third Alternative to Green Growth and Degrowth' (2020) 12 Sustainability 9825.

[97]*Native Village of Kivalina v ExxonMobil Corp* 696 F.3d 849, 858 (9th Cir 2012), cert denied, 133 S Ct 2390 (2013).

[98]Decision 1/CP.21 (n 13).

[99]van Zeben (n 6).

create tensions between national and international courts, for example in the EU where climate policy is a shared competence between the EU and its Member States. While the judicial recognition of climate change interests may be viewed as an overall positive development, it may lead to the further erosion of confidence in and relevance of internationally negotiated solutions, rather than have a reinforcing effect. Keeping that risk in mind, there is no time like the present to save our common future.

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